FILED

IN THE

Supreme Court of the United States

October Term, 1946.

WESTERN UNION TELEGRAPH COMPANY, Petitioner,

versus

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

REPLY BRIEF FOR PETITIONER.

CHARLES W. MILNER,
HUBERT T. WILLS,
R. HUDSON MILNER,
Kentucky Home Life Building,
Louisville 2, Kentucky,
Attorneys for Petitioner.

JOHN H. WATERS,
60 Hudson Street,
New York 13, New York.

BULLITT & MIDDLETON,
Louisville 2, Kentucky,
Of Counsel.

March 25, 1946.

WESTCOTT-BAUM CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 622.

WESTERN UNION TELEGRAPH COMPANY, - *Petitioner,*

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, - *Respondent.*

REPLY BRIEF FOR PETITIONER.

Our petition is based primarily upon the conflict between the decision of the Sixth Circuit Court of Appeals in the instant case with the decision of the Fourth Circuit Court of Appeals in the case of *Blankenship* v. *Western Union,* 161 Federal 2d 168.

The Fourth Circuit Court of Appeals in the *Blankenship* case held that 9-A agents of the Telegraph Company were independent contractors and not employees. The Sixth Circuit Court of Appeals in the instant case held that the 9-A agents and the employees of the 9-A agents were not independent contractors, but employees of the Telegraph Company.

Obviously there could not be more of a direct conflict between decisions of Circuit Courts of Appeals than where two Circuit Courts of Appeals arrive at opposite decisions as to the same Company and the same agency relationship.

Respondent's brief attempts to belittle the decision in the *Blankenship* case.

1. At pages 16-17 respondent's brief claims that the decision in the *Blankenship* case was rendered prior to the decisions of this Court in *Harrison* v. *Greyvan Lines,* 331 U. S. 704; *United States* v. *Silk,* 331 U. S. 704; and *Rutherford Food Corporation* v. *McComb,* 331 U. S. 722.

Petitioner asserts that the decisions of this Court in these three cases are not contra to the decision in the *Blankenship* case. On the contrary, petitioner relies on these three cases from this Court as supporting petitioner's position and the decision of the Fourth Circuit Court of Appeals in the *Blankenship* case.

2. Respondent's brief (footnote, p. 17) goes outside of the Record to state that "the Administrator was not advised of the date of the argument of the appeal[1] until it was too late to present his views to the appellate court." On account of respondent's departure from the Record, we know we will be excused for also going outside of the Record to state that prior to the argument in the *Blankenship* case the Administrator filed a motion in the Fourth Circuit Court of Appeals for leave to file a brief as *amicus curiae.* In this motion the Administrator stated:

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[1]In the Blankenship case.

"The issues raised in this case, relating to the existence of an employment relationship under the Act, are similar or closely related to those pending before the Circuit Court of Appeals for the Sixth Circuit in the case of *Western Union Telegraph Company* v. *Walling,* No. 10422, in which judgment was entered for the Administrator in the District Court for the Eastern District of Kentucky."[2]

3. Respondent's brief attempts to show that the facts in the instant case are different from the facts in the *Blankenship* case.

This depends upon whether the applicable facts in the instant case are those that existed at the time of the trial and for a long time prior thereto or a few mistakes made at the three Kentucky towns of Paris, Morehead and Versailles which had been corrected.

Appellant's brief nowhere claims that the facts stated in our petition (pp. 6-12) as to each of the seven Kentucky towns named in the judgment of the District Court are inaccurate in any respect. These facts show a bona-fide independent contractor relationship exactly as the relationship in the *Blankenship* case.

Unless the few admitted but rectified mistakes at Paris, Morehead and Versailles are held to be Telegraph Company general policies, there are no differences between the facts in the *Blankenship* case and the facts in the instant case.

[2]An attested copy of this motion was filed with the Clerk of the Sixth Circuit Court of Appeals.

We will not go through respondent's brief to point out that what are alleged to be Telegraph Company general policies are in fact only the admitted but rectified mistakes at the three towns named.

In the footnote at page 16 of respondent's brief it is stated that the injunction "makes petitioner responsible only for the time the employee is * * *." Such responsibility is also provided for by the Act if there is an employer and employee relationship. The Act provides "every employer shall pay to each of his employees * * *."

However, the injunction in the instant case actually imposes no responsibility for payment on the Telegraph Company. The court recognized that both the 9-A agents and their employees attended to the primary work of the 9-A agent. The injunction is against the Telegraph Company allowing anyone to operate its facilities who "receives" less than the minimum of the Act. Thus the court amended the Act and changed its meaning and effect.

Respectfully submitted,

CHARLES W. MILNER,
HUBERT T. WILLIS,
B. HUDSON MILNER,
Attorneys for Petitioner.

JOHN H. WATERS,
BULLITT & MIDDLETON,
Of Counsel.